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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

CAROLINE CASEY and MAGGIE
FLAHERTY,

Plaintiffs,

v.

WILLIAM GARDNER, in his official capacity as New Hampshire Secretary of State and GORDON MACDONALD, in his official capacity as New Hampshire Attorney General,

Defendants.

NEW HAMPSHIRE DEMOCRATIC PARTY,
By Raymond Buckley, Chair,

Plaintiffs,

v.

WILLIAM GARDNER, in his official capacity as New Hampshire Secretary of State, and GORDON MACDONALD, in his official capacity as New Hampshire Attorney General,

Defendants.

BEFORE THE HONORABLE JOSEPH N. LAPLANTE

1 APPEARANCES:3 For the Plaintiffs:

4 Henry Klementowicz, Esq.
5 Gilles R. Bissonnette, Esq.
6 American Civil Liberties Union
7 of New Hampshire

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7 For the NH Democratic:
8 Party

9 William E. Christie, Esq.
10 Suzanne Amy Spencer
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11 For the Defendants:

12 Anthony Galdieri, Esq.
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18 Official Court Reporter
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P R O C E E D I N G S

2 THE CLERK: All rise for the Honorable Court. Court
3 has before it for consideration today a Special Hearing in
4 Civil Case Number 19-cv-149 JL, Casey, et al. versus New
5 Hampshire Secretary of State, et al.

6 THE COURT: All right. Good morning, Counsel.

7 We're here today because the Court basically in an
8 order dated October 9th sort of floated the idea of certifying
9 questions to the New Hampshire Supreme Court to interpret the
10 statutory regime regarding this relationship between domicile,
11 residency, voting registration and motor vehicle enforcement,
12 and I guess that's what I would like to talk about first. But
13 I think -- I'd like to talk about that first.

14 You have filed your responses to that. It's fair to
15 say the Attorney General's Office opposes any certification.
16 The ACLU says, well, certification isn't necessarily a bad
17 idea, but we would need -- in order to prevent unlawful
18 suppression of the right to vote and confusion about voting we
19 need some type of temporary order in place to limit certain
20 types of enforcement to enable the certification to play out
21 and then the trial in this case. So, I have read your
22 submissions.

23 Let me ask one procedural question, first, of the
24 plaintiffs before we get to the general issue. The four
25 issues, the four questions that I propose for certification,

1 which is on Page 6 of my order, Document 56, are you -- I want
2 to be clear that all four of those questions you support
3 certification of, or is there anything that you don't? It
4 wasn't 100 percent clear from your filings.

5 MR. KLEMENTOWICZ: We don't oppose, so subject to our
6 initial --

7 THE COURT: Reservation.

8 MR. KLEMENTOWICZ: -- reservation about the temporary
9 order, we don't oppose certification of any of these four
10 questions. Our submission was I think in some ways a recasting
11 of some of your questions, just in a different way.

12 THE COURT: Yeah.

13 MR. KLEMENTOWICZ: I think they're similar. I think
14 it was -- the way that we had cast the question was in response
15 to what we had seen as public hairsplitting by some of the
16 state agencies involved in the enforcement of this law.

17 So, our casting of the questions I thought was a more
18 direct way to get an answer to the questions, but we don't
19 oppose any of the questions.

20 THE COURT: Any of the four?

21 MR. KLEMENTOWICZ: Correct.

22 THE COURT: All right. Good. All right. I'll hear
23 from the State, then.

24 MR. GALDIERI: And, your Honor, I think we've agreed
25 that we could submit our certification arguments on our papers;

1 we don't need to argue anything.

2 THE COURT: All right.

3 MR. KLEMENTOWICZ: And the same with the Motion to
4 Amend we also thought you could take on the papers.

5 MR. GALDIERI: Yeah.

6 THE COURT: All right. I guess there's not much to
7 talk about, then. I'm sorry for convening you all back in the
8 courtroom.

9 MR. KLEMENTOWICZ: Well, we did want to suggest a
10 proposed briefing order on the preliminary injunction. We
11 discussed and had agreed on a briefing order that would have a
12 Motion for Preliminary Injunction due a week from today, an
13 objection due a week thereafter, no reply briefing. We're
14 going to be submitting affidavits likely in more detail than
15 what was submitted in our response to the Court's order, and we
16 had envisioned the Court reviewing those papers, and if it
17 determined that an evidentiary hearing or another hearing was
18 needed, scheduling one ideally within November.

19 THE COURT: Yeah.

20 MR. GALDIERI: And, your Honor, our only reservation
21 to that is we have our expert, who is out of town for two
22 weeks, his disclosure date is November 25th. This is not on
23 his radar. But he will return right around the time our
24 objection is due, and we may need to supplement the record,
25 depending on what their submission is, with a declaration from

1 our expert. We would ask that we be able to do that.

2 MR. KLEMENTOWICZ: We haven't had an opportunity to
3 consult internally on that. We may agree to it.

4 THE COURT: All right. It's reasonable. I'll allow
5 it. And just be aware this may require like a Saturday
6 hearing, unfortunately. November is very busy with a lot of
7 civil and criminal trial work, and I don't want to kick it into
8 December. You're all working very hard on this, and I want to
9 be as respectful on that as I can, and if we are going to
10 certify the question we just added two weeks. Frankly, I had
11 planned on certifying this very quickly, but the certification
12 question, even for the Court, not just for your desires, is
13 tied up with this order, this idea of temporary relief, because
14 certifying the question without temporary relief could be
15 problematic, as you point out. And, as you point out, they may
16 not be entitled to it. As the State points out, they may not
17 be entitled to it. It's not where I wanted to be in this
18 litigation, but we are where we are.

19 I'm interested in hearing -- apparently, the Attorney
20 General's position is -- and if I state this wrong I want you
21 to correct me, Mr. Galdieri. I mean that.

22 MR. GALDIERI: Sure.

23 THE COURT: I'm not saying that to taunt you; I'm
24 saying that to invite you. Is that the Attorney General's
25 position, that we had a brief chambers discussion before the

1 hearing, is that the Attorney General doesn't have the
2 authority to agree to any sort of temporary relief, and I
3 believe that there is a decent amount of precedent for the
4 Attorney General doing just that in certain difficult
5 situations. If there is precedent for that, I'm interested in
6 knowing it. I'm interested in knowing about it, and I don't
7 think it really goes to the merits of the question so much, but
8 I'm still interested in knowing about it, because I would have
9 viewed some type of temporary order just not to use voter
10 registration information for the enforcement of motor vehicle
11 laws to be a very small, very unobtrusive, not burdensome order
12 for the State to comply with, although, on the symbolic level I
13 do understand it's different, but on the purely practical level
14 it seems like a very small thing. I think I have examples in
15 my mind of much larger restraint undertaken by the AG by
16 agreement in the past. So, if there's examples for that, I'd
17 like to know about it.

18 MR. KLEMENTOWICZ: I'm going to let Attorney Christie
19 handle that.

20 MR. CHRISTIE: I'd like to address an example, and I
21 misspoke in chambers when I referenced it, firearm law. I
22 don't know, and maybe there is one. But what was actually on
23 my mind, it was a situation in the campaign finance context
24 that involved an election. There was a complaint filed with
25 the AG's Office that a law firm that was organized as an LLP

1 made a contribution to Governor Sununu's reelection campaign,
2 and there's a state statute that doesn't permit that. There
3 was a challenge filed with the Attorney General's Office on
4 that very issue. The Attorney General's Office reviewed the
5 issue, reviewed the statute, and despite its obligation to
6 enforce all statutes on the books, made a determination the
7 statute violated the First Amendment and decided not to enforce
8 it in that context.

9 THE COURT: This is totally different. The Attorney
10 General stands by this statutory regime, though.

11 MR. CHRISTIE: It's a law enacted by the Legislature
12 and signed by the Governor. Under their arguments, they have a
13 duty to enforce it, and it's not for them to sit there and
14 decide not enforce to it. That can only be a determination
15 made by a Court to enjoin the law. They exercised their
16 discretion in this campaign finance case to not enforce the
17 statute, because they determined on their own, despite it being
18 passed by the Legislature and signed by the Governor, that it
19 was unconstitutional. We're not even asking for that relief
20 here. We're simply asking for relief that they would
21 temporarily not use the active voter registration to prosecute
22 individuals, not to overturn the statute, which they did in
23 this campaign finance situation. And we can submit the letter
24 to the Court.

25 But it isn't exactly the same. It is the Attorney

1 General taking upon himself -- and by "himself" I mean the
2 Office -- to review a statute, determine on their own, not a
3 federal court, not a state court, that the statute violates the
4 First Amendment and they're not going to enforce it. It
5 materially contradicts the representations that are made here
6 that they don't have the discretion and they don't have the
7 authority to do that.

8 MR. GALDIERI: That's not the case, your Honor, and I
9 can address that. I mean, the Attorney General's --

10 THE COURT: It's pretty obvious -- with respect to
11 Mr. Christie, it's pretty obvious how this is a very different
12 situation.

13 MR. GALDIERI: Yes.

14 THE COURT: You're standing by the constitutionality
15 of the statutory regime, you're not disavowing it. And there
16 is an argument that if the Attorney General, if the Attorney
17 General, the chief law enforcement officer of the State, views
18 a state statute as unconstitutional, one would argue that it
19 might have the duty not to enforce it. There's this idea that
20 anybody who's ever worked at the AG's Office, like myself, is
21 very familiar with, I don't want to call it a "trope," but with
22 the tradition that the Attorney General's Office defends the
23 constitutionality of the state statutes.

24 And, Mr. Christie, in your situation they disavowed
25 the constitutionality, they disavowed the statute. In this

1 case they are arguing for the constitutionality of this regime
2 and saying that it's not within their authority to restrain
3 enforcement of a lawful statute.

4 MR. CHRISTIE: Respectfully, your Honor, I disagree.
5 Their position is they don't have the authority to make the
6 call; if the law is on the books, they have a solemn oath to
7 enforce it, was the phrase used. Their position in this case
8 with you is, "We can't make the call. Only a Court can make
9 the call." That's clearly not the case for the reasons your
10 Honor just laid out. They make that call all the time, and
11 they just will not make the call in this case because, from our
12 perspective, they want to be able to enforce the statute as
13 written in the run-up to the election. That is something
14 within their discretion to do.

15 And, again, the Court's suggested order and the relief
16 that we're asking for in this case is far short of what we
17 would really want from the Court ultimately in this case, but
18 it's something for the purposes of litigation management in
19 this case we're willing to live by so that the case can proceed
20 orderly, as the Court has suggested, and so at some level these
21 confusion issues that we've raised can be addressed.

22 MR. GALDIERI: Well, your Honor, we disagree with
23 that. Patently unconstitutional law. We have taken an oath to
24 uphold the Constitution as well. That presents a different
25 circumstance. This law is constitutional, there's been no

1 showing made that it's unconstitutional, and we are defending
2 this law.

3 THE COURT: One thing I struggle with, though, and I
4 do think there's a distinction between the situation
5 Mr. Christie raised. It depends on what level of generality
6 you want to look at the Attorney General's obligation here. Is
7 it to just defend all laws, or is it to defend only laws that
8 are constitutional? And you've told me your positions on that.

9 Here's the thing: The Court's suggestion for a
10 temporary order was very, very modest, and the position that
11 you don't have the authority not to use voter information for a
12 few months to enforce motor vehicle laws, it seems in some way
13 to run counter to your position about what the statutory regime
14 is in general, because you keep saying this isn't a voting law,
15 it doesn't change voting eligibility, has nothing to do with
16 voting, it's a DMV law, right? If it isn't a voting law, if
17 it's not a voter eligibility law, I'm not sure what difference
18 it makes for the State to say -- you're not saying you're not
19 going to enforce any law. You're saying, you would be saying
20 if you agreed to this temporary order, that you wouldn't use a
21 certain type of evidence, right, in violation of motor vehicle
22 prosecutions -- by the way, evidence that the state has never
23 used, as far as I can tell, because there is a new statutory
24 regime. So, which is it? Is it a statutory regime that
25 implicates the right to vote, or is it not? Because if it's

1 not, as you've been saying all along, this is a very small
2 thing.

3 MR. GALDIERI: It's not, your Honor, and that's why
4 there's no reason to enter any relief. There's just no reason.
5 It is all superfluous, and we're not going to agree to
6 something that may tie someone's hands in enforcing, using it
7 as evidence to enforce the Motor Vehicle Code in that way or
8 some other way. That's not within the authority of the
9 Attorney General, and he's not going to do that.

10 THE COURT: And, for the record, and I want to make
11 this clear, you're not under an obligation to agree to
12 anything. That was a suggestion by the Court.

13 MR. GALDIERI: I understand.

14 THE COURT: And you don't have to apologize for your
15 litigation decisions. I don't want to make it sound that way.
16 You're trying to apply the law here, and I know. I'm wondering
17 about the consistency, though, of this rationale, of this
18 rationale with your overall position that this isn't a voting
19 law, it doesn't affect voting eligibility. You made your
20 point, though.

21 All right. So, your proposal is one week for the
22 plaintiffs to file their Motion for Preliminary Injunction, one
23 week after that to file an objection, no replies or surreplies,
24 and a hearing within a pretty quick amount of time. So, let me
25 just look at this calendar.

1 MR. GALDIERI: Just, your Honor, an opportunity to
2 supplement our submission with a declaration for our expert, if
3 that is required.

4 THE COURT: Sure, but I think you're going to have
5 to -- reasonableness would dictate that if they need to get a
6 reply in to that, I've got to allow a reply. Do you have any
7 expert witnesses planned?

8 MR. GALDIERI: We have an expert witness. Haven't
9 made a decision. Probably will not use our expert on the PI,
10 but haven't made a final decision.

11 THE COURT: Okay. Let's see here.

12 MR. GALDIERI: And we may ultimately not use ours, if
13 they don't use theirs.

14 THE COURT: All right. Today's the 30th, right?

15 MR. GALDIERI: Yes.

16 THE COURT: So, that means November 6 for the motion,
17 November 13th.

18 Now, Jadean, on the 18th we're starting a jury trial,
19 right?

20 THE CLERK: The 19th.

21 THE COURT: The 19th. That's the two jury trials,
22 right?

23 THE CLERK: We're either going to do one of the first
24 week of November, the 6th, 7th, and one the 19th and 20th.

25 THE COURT: Okay. The last week of November we have

1 that civil injunction case, right? Yeah, we do.

2 THE CLERK: Yes, two days.

3 THE COURT: I think what this might be, then -- how
4 does the 18th look, Jadean?

5 THE CLERK: It's full, but it's full of sentencing,
6 but we can move things.

7 THE COURT: Okay. How does Friday, the 22nd, look of
8 November?

9 THE CLERK: It's full of sentencing and a motion
10 hearing.

11 THE COURT: Great. Okay. Tentatively -- I really
12 hate saying this, but tentatively you're going to have to look
13 at the 23rd, the Saturday. The thing about November, though,
14 is we've had all of these civil and criminal hearings scheduled
15 that have blocked everything else. They do keep changing and
16 moving, as they often do, so if there's a better way of
17 approaching that than a Saturday, I will certainly try.

18 I'm interested in hearing -- there was a
19 representation at some point here. I think it was by your
20 side, actually -- yeah -- that there are a number of states
21 that have virtually the same regime, right: domicile equals
22 residency; residency can be established by registering to vote?
23 I know that kind of data, "Everyone's doing it" data, doesn't
24 really address the Constitution, but I'm still interested in
25 knowing it. It doesn't really solve or dispose of

1 constitutional questions, but I'm still interested in knowing
2 it.

3 Is that data available, and do you envision putting it
4 together?

5 MR. GALDIERI: We can put it together in our
6 submission. That is and has been the case in most states in
7 the Union for a very long time. We're one of the few states
8 that has this strange dichotomy in our regime as a result of
9 some statutory --

10 THE COURT: Domicile residency.

11 MR. GALDIERI: -- yeah, has this sort of
12 counterintuitive regime that in itself is inherently confusing
13 and may raise equal protection concerns. So, we can brief
14 that.

15 THE COURT: I was more focused on just -- that's fine.
16 I was more focused on just knowing, though, the number of
17 states that have an enforcement regime that looks equal to New
18 Hampshire's new one. That's what I want to know.

19 MR. GALDIERI: Well, your Honor, I guess, as we keep
20 talking about an enforcement regime, I don't understand what
21 that means in this case. We have a law that's --

22 THE COURT: And that's a problem for me, though.

23 MR. GALDIERI: -- that amends statutory definitions.

24 THE COURT: Shouldn't people know -- let me just ask
25 it this way: Is it a problem that I register to vote, if I'm a

1 college student, and college students have been domiciled here
2 and able to vote, isn't it a problem constitutionally -- no, I
3 don't want to say "constitutionally," because they're never
4 going to concede that. Isn't it important to know if I
5 register to vote and I have an out-of-state license I'm
6 potentially exposing myself to criminal prosecution?

7 MR. GALDIERI: Your Honor, this issue does not have
8 anything to do with registering to vote. It has to do with
9 when you establish domicile. This is a qualification to vote.
10 And what we're saying is people have to inform citizens of the
11 State of every collateral consequence that attends to
12 establishing domicile in New Hampshire: What taxes do I have
13 to pay? Do I have to pay the interest and dividends tax? Do I
14 have to register my OHRV, my snowmobile, my car? What do I
15 have to do now that I have decided that I'm a domiciliary of
16 this state, and that can happen unattached to voting. That is
17 all that -- that is the question in this case. It's not an
18 enforcement regime. It is a consequence of establishing this
19 state as your domicile. Choosing as a nonresident to become a
20 resident of this state brings about it obligations of
21 residency.

22 THE COURT: Doesn't an enforcement regime include, at
23 least as a practical matter, the evidence law enforcement can
24 bring to bear in a criminal prosecution? Because until this
25 statute, right, much voter registration information wasn't

1 evidence to use in a case like this, or was it?

2 MR. GALDIERI: I think that's incorrect. It was
3 evidence.

4 THE COURT: It was already?

5 MR. GALDIERI: It is evidence that you are domiciled
6 somewhere. Voter registration is one of the key indicators in
7 the law of domicile that you are domiciled somewhere.

8 THE COURT: But motor vehicle enforcement was based on
9 residency, not on domicile.

10 MR. GALDIERI: But it is an indicia that you may be a
11 bona fide resident of the state. It is evidence.

12 MR. KLEMENTOWICZ: It wasn't conclusive proof of one's
13 intent to remain in New Hampshire for the indefinite future.
14 So, you couldn't just introduce someone's voter registration
15 and that proves up the residency requirement, like it probably
16 could now.

17 And just on the point about registering to vote
18 doesn't establish domicile, domicile requires that one manifest
19 an intent to participate in democratic self-government in New
20 Hampshire, which is precisely what registering to vote is, and
21 maybe the people can establish domicile in other ways, but
22 certainly the act of registering to vote contemplates both
23 manifestation of and a declaration of domicile and now
24 probably, although it's confusing, residence.

25 And the only other point that I'll add to this on the

1 confusion is people aren't asking, as far as I know, Town
2 Clerks whether they need to register their ORV or pay interest
3 and dividends tax. They're asking, "Do I need to get a
4 driver's license if I register to vote?" And the guidance that
5 has been given from the Secretary of State's Office is, "I'm
6 sorry, you're on your own," whereas, previously there was
7 guidance that said domicile and residence are different. So,
8 there is that confusion, and no one will give the voters a
9 straight answer as to what follows from registering to vote.

10 THE COURT: You're answering the confusion question.
11 I was asking Mr. Galdieri the burden question. It's a
12 different question.

13 MR. KLEMENTOWICZ: Well, I think confusion is a
14 burden. I think that's what happened in the Guare case, where
15 they struck the language from the registration form because it
16 was confusing and misstated the law, and the confusion led to
17 people not voting because they didn't know what their
18 obligations were.

19 THE COURT: You were interrupted.

20 MR. GALDIERI: Your Honor, this case is not like
21 Guare. Guare was about a statement on an actual voter
22 registration form that inaccurately stated the law.

23 On the point of confusion, HB 1264 struck four words
24 from those definitions that this Court in the Newburger case
25 said made no rational sense, they made no rational sense, and

1 it struck those four words, and it equated a resident to a
2 domiciliary. Somebody who now says they are domiciled here is
3 a resident here, and all of the obligations of residency apply
4 to them. That is not confusing. There is nothing confusing
5 about that. If somebody shows up and says to a Town Clerk who
6 doesn't issue driver's licenses, "Do I have to get a driver's
7 license?", I would expect the Town Clerk to say, "I don't know
8 if you have to get a driver's license. You have to determine
9 whether you have to get a driver's license."

10 And we take issue with the notion that a voter
11 registration on its own is conclusive proof in a prosecution.
12 I don't think it could be conclusive proof. It may be strong
13 evidence.

14 THE COURT: The trier of fact determines what
15 conclusive proof is.

16 MR. GALDIERI: Right, but it's not conclusive proof.
17 So, this confusion issue is largely a being of their own
18 creation. They cite people talking in newspaper articles about
19 hearsay and people don't know what's going on, because no one
20 will give them a clear answer. If you're domiciled here you're
21 a resident here, and all the obligations that attach to being a
22 resident of the state apply to you. That's how it works.

23 THE COURT: What?

24 MR. KLEMENTOWICZ: I was just going to say that's not
25 really the guidance that the Secretary of State's Office was

1 given by the Attorney General's Office. It's a little bit
2 inconsistent. If I could just have a moment. They said in a
3 letter -- and this is attached to our pleadings -- that says,
4 "If a person will drive in New Hampshire and currently
5 possesses an out-of-state driver's license -- "

6 THE COURT: Please read slowly.

7 MR. KLEMENTOWICZ: I'm sorry -- "this includes the
8 obligation to obtain a New Hampshire driver's license within
9 60 days of establishing a bona fide residency in the State, RSA
10 263:35. However, individual circumstances may vary, and this
11 obligation should be determined on a case-by-case basis."

12 So, that's different than what they've been saying --
13 what's been said publicly.

14 MR. GALDIERI: Your Honor, as we all know in the law,
15 there are many, many exceptions. To give a blanket statement
16 that covers absolutely everybody and everyone's situation is
17 difficult to do. People are required to know the law and
18 assess their obligations when they decide to become a resident
19 of a particular state. It is not incumbent upon the Attorney
20 General's Office or the Secretary of State's Office to tell
21 them of every collateral consequence of doing that. That's not
22 a rational system.

23 THE COURT: I have to admit, and I think said at the
24 last hearing, it's far from clear to me that the burdens
25 imposed by this regime are particularly burdensome on the right

1 to vote.

2 All right. Well, thank you.

3 MR. GALDIERI: Thank you, your Honor.

4 THE COURT: So, you don't want to be heard on the
5 amendments other than the written submissions or the
6 certification. I take you at your word. I'll get decisions
7 out on that.

8 I assume, by the way -- because, believe it or not,
9 I'm going to give a little bit more thought to certification
10 before I actually do it. I assume, by the way, that your
11 desire for a temporary injunctive relief is contingent upon
12 certification, right? If I'm not going to certify, you don't
13 need that motion, because we're going to have a trial in
14 January, and we'll have a decision well before the primary.

15 MR. KLEMENTOWICZ: That's right.

16 THE COURT: Okay. Thank you.

17 MR. GALDIERI: Thank you, your Honor.

18 THE CLERK: All rise.

19 THE COURT: We're adjourned.

20 (WHEREUPON, the proceedings adjourned at 10:57 a.m.)

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